BALAMONEY ASORIAH v. MMIP SERVICES SDN BHD

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
MARY LIM JCA
YEW JEN KIE JCA
[CIVIL APPEAL NO: B-02(NCVC)(A)-2604-12-2018]
14 OCTOBER 2019

INSURANCE: *Motor insurance – Policy – Validity – Failure of disclosure – Allegation of – Policy renewed in deceased's name after death of deceased – Whether insurance policy null and void – Whether there was fundamental breach of principle of uberrimae fidei – Whether there was mutual duty of utmost good faith owed by both insurer and consumer – Whether insurer entitled to void insurance contract – Failure of insurer to undertake exercise of posing questions when considering to assume risks and enter contract of insurance with consumer – Whether insurer deemed to have waived right to complain that there had been failure of disclosure – Whether insurer failed to safeguard own interest and obligations – Whether insurer allowed to approach court for declaration to void insurance under s. 96(3) of Road Transport Act 1987 – Whether insurer failed to discharge burden of proof under s. 129 read together with Schedule 9 of Financial Services Act 2013*

On 28 October 2016, Jayandran Mathan ('Jayandran'), a minor, was riding pillion on a motorcycle which was involved in a collision with a motor van driven by the first defendant and owned by the deceased ('Selvamani'). Jayandran's mother ('the appellant') decided to sue on her son's behalf. As required under s. 96(3) of the Road Transport Act 1987 ('Road Transport Act'), she served a notice on the insurer ('the respondent') prior to the filing of the suit ('the civil suit'). It was, however, discovered that Selvamani had passed away on 20 April 2016, well before the accident. It was also discovered that the insurance policy that Selvamani had taken with the insurers ('the policy') had expired on 4 May 2016, after his demise. The policy was nevertheless renewed in Selvamani's name from 10 May 2016 to 9 May 2017. The respondent filed an originating summons before the High Court seeking declaratory orders to the effect that it was not the insurer of the said motor van at the time of the accident; and that the insurance policy was null and void by reason of a fundamental breach of the principle of *uberrimae fidei* or duty of utmost good faith, the breach of which entitled the respondent to void the insurance contract. The High Court, in granting the respondent's application, held that when the material fact that Selvamani had already passed away was not disclosed to the insurer at the time the insurance policy was renewed by whoever had done the renewal, there was a breach of the principle of utmost good faith which entitled the insurer to void the renewed policy. Hence, the appellant appealed against the decision of the High Court.

Held (allowing appeal; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The declaratory orders sought by the respondent concerned the status and validity of the insurance contract made not between the parties, but between the respondent and Selvamani, who was not a party in the appeal. Given the nature of the issue, its determination by way of an exchange of affidavits and with the critical parties not before the court was not appropriate. The respondent's allegations of misrepresentation by Selvamani or by whoever had renewed the insurance policy without evidence of the circumstances as to how or when the insurance policy was actually renewed were necessarily questions of mixed fact and law; and the issue certainly involved Selvamani as well as the driver of the motor van. Further, no reasons were proffered as to their absence or lack of participation in the proceedings before the High Court. The appellant, who was not a party to the insurance policy, was not in the position to answer or even deal with the issue(s) posed by the respondent. The circumstances and conditions surrounding the renewal were clearly beyond the capacity and remit of the appellant to address, let alone answer. Hence, such applications ought not to be dealt with in the manner done, especially where the relevant and necessary parties were not before the court. (paras 21-23)

(2) Schedule 9 of the Financial Services Act 2013 ('Financial Services Act') makes a distinction between contracts of insurance with consumer insurance contracts, the latter being defined in para. 2 as a 'contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession.' The policy in this appeal was a consumer insurance contract. Consequently, and by necessary implication, the Financial Services Act applied to the present appeal in that s. 129 and thereby Schedule 9 will apply to all consumer insurance contracts which were either entered into or renewed after 1 January 2015. (para 32)

(3) In relation to the policy in question, it being a consumer insurance contract, para. 5 of Schedule 9 of the Financial Services Act applied. The new statutory regime recognises in sub-para. 5(9) the mutual duty of utmost good faith or *uberrimae fidei* that was owed at all times by both parties to the insurance contract, whether on the part of the insurer or the insured; whether it was in relation to a new insurance contract or a renewal of the same. This duty of utmost good faith does not end with the imposition of duty on the consumer. In relation to the insurer, the 'doctrine of waiver' operates. Where the insurer does not undertake the exercise of posing questions when considering whether or not to assume

risks and enter the contract of insurance with the consumer, the insurer is deemed to have waived the right to complain that there had been a failure of disclosure – sub-para. 5(5). The insurer was also deemed to have waived its right to complain in a situation where questions were posed but the consumer had come up short in their responses or had simply failed to respond to those questions. Where the insurer itself failed to follow up with the consumer on such failure, and where it did not pursue the matter, the consumer's duty of disclosure 'shall be deemed to have been waived by the insurer' under sub-para. 5(6). Where the insurer is in itself in breach either by not pursuing or safeguarding its own interest and obligations, it would not be open to the insurer to approach the court for a declaration under s. 96(3) of the Road Transport Act to void the insurance contract (paras 35, 37, 38 & 43)

(4) The respondent had not discharged its burden of proof under s. 129 read together with Schedule 9 of the Financial Services Act so as to be entitled to the discretionary remedies. It never posed any questions to Selvamani or whoever was renewing the policy. This court did not see how just the fact that Selvamani was deceased *ipso facto* invalidated the renewed policy. This was incorrect. The whole process or procedure under Schedule 9 must be complied with and answered. There was no evidence at all of the respondent doing any of the matters that were mentioned in Schedule 9, especially sub-para. 5(3) nor of the judge addressing these critical matters. Under such conditions, it was not open to the respondent to approach the court and complain that there was misrepresentation. The failure of the trial judge to apply s. 129 and Schedule 9 was sufficient reason for this court to intervene and set aside the decision of the trial judge granting the declaration sought under s. 96(3) of the Road Transport Act (paras 48, 52 & 53)

(5) Devoid of any compliance of the mandatory requirements emplaced under s. 129 and Schedule 9 of the Financial Services Act, the respondent was not at all entitled to the orders granted by the High Court. It would be in direct contravention of s. 129 and Schedule 9 of the Financial Services Act were this court to condone such breaches. It would bring untold injustice and prejudice to innocent third parties such as the appellant in this appeal, the parties who were the intended recipients of the benefits behind ss. 90 and 96 of the Road Transport Act and s. 129 of the Financial Services Act. There was no basis for the exercise of discretion in granting the declarations sought by the respondent. In fact, it would be unjust for the court to grant such orders. (paras 60 & 63)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Co (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd [2015] 9 CLJ 552 CA ***(refd)***

Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***

Merchants and Manufacturers, Insurance Co Ltd v. Hunt and Other [1941] 1 All ER 123 ***(refd)***

Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad [2018] 9 CLJ 691 FC ***(refd)***

Zurich General Accident and Liability Insurance Co Ltd v. Morrison [1942] 2 KB 52 ***(refd)***

Zainudin Mat Isa & Anor v. The Pacific Insurance Bhd & Ors [2017] 1 LNS 1979 CA ***(refd)***

Legislation referred to:

Financial Services Act 2013, s. 129, Schedule 9 paras 1(2), (3), 2, 3(1), (2), (6), 5(1), (2), (3)(a), (b), (4), (5), (6), (9), 7(3), (4), (5), (6), (7), (8)

Road Transport Act 1987, ss. 90, 96(3)

Road Traffic Act 1934 [UK], s. 10(3)

Other source(s) referred to:

G Naidu, *Statutory Liability of a Motor Insurer to satisfy a judgment obtained by a third party: Recovery of Execution,* [2019] 1 LNS (A) xcviii

For the appellant - Ramesh Namasivayam; M/s Sivaraja & Co

For the respondent - Shanmugam Ramasamy & Sharmini Thiruchelvam; M/s Francis Pereira & Shan

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24NCVC-992-08-2018 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JCA:

[1] On 28 November 2018, the High Court granted the respondent's application made pursuant to s. 96(3) of the Road Transport Act 1987, for *inter alia* a declaration that insurance policy number 213-08116-004654 (said policy) is void and unenforceable. The respondent was further granted several other declaratory reliefs exonerating it from liability for the accident on 28 October 2016 involving motor-van No. BEM 6573 and motorcycle No. BKB 6097. The appellant was one of the persons involved in that accident.

[2] Upon appeal, we unanimously allowed the appeal and set aside the decision of the High Court.

Salient Facts

[3] These are the details of the accident and the insurance policy in issue. On 28 October 2016, Jayandran a/l Mathan (Jayandran), a minor, was riding pillion on motorcycle No. BKB 6097. That motorcycle was involved in a collision with motor-van No. BEM 6573 driven by the first defendant and owned by one Selvamani a/l Athimoolam (deceased) (Selvamani). Jayandran was injured in that accident.

[4] His mother, Balamoney a/p Asoriah decided to sue on his behalf. As required under s. 96(3) of the Road Transport Act 1987 (Act 333), she served a notice on the insurer prior to the filing of the suit. Civil Suit No. BL-A53KJ-20-01-2018 was then filed at the Sessions Court at Klang (the said civil suit).

[5] In the said civil suit, the van driver and the estate of Selvamani were cited respectively as the first and second defendants. The insurer instructed solicitors to handle the said civil suit, and appointed adjusters to locate Selvamani and the driver of the motor-van.

[6] It was then discovered that Selvamani had actually passed away on 20 April 2016, well before the accident on 28 October 2016. In fact, he had passed away even before the insurance policy was renewed. It was also discovered that the insurance policy that Selvamani had taken with the insurers, that is, Policy No. 213-081-15-004895 had expired on 4 May 2016 after his demise. The policy was nevertheless renewed in Selvamani's name, from 10 May 2016 to 9 May 2017 *vide* Policy No. 213-08116-004654.

[7] The insurer decided to file an originating summons before the High Court seeking declaratory orders to the effect that it is not the insurer of motor-van No. BEM 6573 at the time of the accident; and that Insurance Policy No. 213-081-16-004654 was null and void by reason of a fundamental breach of the principle of *uberrimae fidei* or duty of utmost good faith, the breach of which entitles the insurer to void the insurance contract. The orders sought are as follows:

i. Satu deklarasi bahawa Plaintif bukan penginsuran bagi motorvan No. BEM 6573 pada 28.10.2016 kerana pemilik asalnya, Selvamani a/l Athimoolan telah meninggal dunia pada 20.4.2016;

ii. Satu deklarasi yang pemandu motorvan No. BEM 6573 yang didakwa terlibat di dalam suatu kemalangan jalanraya pada 28.10.2016 tidak mempunyai kebenaran untuk memandu motorvan tersebut;

iii. Satu deklarasi yang polisi No: 213-081-16-004654 yang dipohon dari Plaintif untuk tempoh 10.5.2016 sehingga 9.5.2017 bagi melindungi motorvan No. BEM 6573 adalah tidak sah (null and void) kerana ianya telah dipohon dengan menggunakan nama Selvamani a/l Athimoolan yang telahpun meninggal dunia;

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iv. Satu deklarasi yang Plaintif tidak bertanggungan bagi sebarang gantirugi yang dituntut oleh mana-mana pihak akibat kemalangan jalanraya yang telah berlaku pada 28.10.2016 melibatkan motorvan No. BEM 6573;

v. Satu deklarasi untuk menggantungkan prosiding di Mahkamah Sesyen sehingga pelupusan Saman Pemula ini.

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[8] The driver of the motor-van, the estate of Selvamani and Jayandran, through his mother, were all cited as defendants in the originating summons.

[9] Only Jayandran, through his mother, who engaged solicitors attended the hearing in the court below. The remaining parties did not take part in the C proceedings at the High Court. Despite the mother's protestations, the application was allowed.

Decision Of The High Court

[10] The reasoning of the learned Judicial Commissioner (learned JC) may D be summarised as follows. First, based on the principle of *uberrimae fidei* which was "clearly applicable" in the present insurance contract, the failure to disclose a material fact at the relevant time was a fundamental breach. Because Selvamani had passed away on 20 April 2016, the insurance policy renewed from 10 May 2016 to 9 May 2017 *vide* Policy No. 213-081-16- E 004654 ("the renewed policy"), in Selvamani's name must have been renewed by a third party. Since Selvamani was already dead at the time the policy was renewed on 10 May 2016, but the fact of his death was not disclosed to the insurer by whoever was renewing the policy, the insurer argued that it was entitled to void the renewed policy and to the other F declaratory orders sought.

[11] According to the learned JC, the fact that Selvamani had already passed away is a material fact. When that material fact was not disclosed to the insurer at the time the insurance policy was renewed by whoever had done the renewal, there was a breach of the principle of utmost good faith G which entitled the insurer to void the renewed policy. The learned JC concluded that the renewal in the circumstances described could only have been achieved by trickery and misrepresentation.

Our Decision

H **[12]** In our view, the decision of the learned JC is plainly wrong in law and on the facts.

[13] The insurer/respondent's application for the various declaratory orders set out earlier was made pursuant to s. 96(3) of Act 333 which reads as follows:

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(3) No sum shall be payable by an insurer under subsection (1) it before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[14] The law is settled insofar as to when a declaration under s. 96(3) of Act 333 ought to be obtained before the insurers concerned may avoid the third party risks imposed by statute.

[15] In *Merchants and Manufacturers, Insurance Co Ltd v. Hunt and Other* [1941] 1 All ER 123, Scott LJ explained the rationale for a declaration in relation to the then s. 10(3) of the UK Road Traffic Act 1934 which is in *pari materia* with our s. 96(3) as follows:

This proviso thus gives to plaintiffs who obtain judgment in an action for damages caused by the negligent driving or management of a motor car a direct right of action against the insurance company who issued the policy required by the 1930 Act, although the plaintiffs in the negligence action are not party to the policy, and although the policy is avoidable at the insurer's instance.

...

From the extreme hardship which might otherwise from sub-s (1), sub-s (3) gives the insurer a conditional means of escape. If he discovers that he was induced to make the contract of insurance by some material non-disclosure or misrepresentation which, by ordinary insurance law, and not merely by reason of some special stipulation which he has put in his form of policy, entitles him to avoid the contract, he may obtain a declaration to that effect from the court, and he will then be free from the statutory liability to the injured third party.

...

This legislation was obviously intended to effect, *inter alia*, a fair compromise between the two desirable but conflicting objects – namely, on the one hand that of protecting the public from the danger of impecunious tortfeasors on the roads, and, on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor in equity, is his policy.

[16] See also *Zurich General Accident and Liability Insurance Co Ltd v. Morrison* [1942] 2 KB 52 where similar views were expressed, that the statutory requirements for compulsory insurance would be of little value if it was open to insurers to freely exclude liability for third party risks:

> Part II of the Road Traffic Act '1934 was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act 1930. That Act and the Third Parties (Rights Against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that if thereafter they were, through no fault of their own, injured or killed by a motor car, they or their dependents would be certain of recovering damages, even though the wrongdoer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, who could fulfill the not very onerous financial requirement that were necessary for acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with any certainty whether, if damages were recovered against the driver of the car, there was a prospect of recovering against the insurer ...
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> In the case of motor car insurance it was the third parties who needed the warning, and unfortunately they had no voice as to the warranties or conditions that were inserted in policies, though it was only because they held a policy that careless drivers were enabled to drive and put others in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by s. 10 of the Act of that year .,. they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford.
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> Generally speaking, s. 10 was designed to prevent conditions in policies from defeating the rights of third parties.

[17] The above decision was adopted by the Supreme Court in *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351, 378 when deliberating *inter alia* the approach the courts should take when interpreting the relevant provisions of Act 333, which the Supreme Court regarded as a "piece of social legislation":

> ... It is important to fit these three elements – the common law principle, the contribution legislation, and the compulsory third party insurance legislation – in such a manner as to ensure that they work In harmony without occasioning injustice.

[18] Discussions on this may be followed in an interesting article entitled "*Statutory Liability of a Motor Insurer to satisfy a judgment obtained by a third party: Recovery of Execution*" by G Naidu published in [2019] 1 LNS (A) xcviii. See also the recent Federal Court decision in *Pacific & Orient Insurance Co Berhad v. Hameed Jagubar Syed Ahmad* [2018] 1 LNS 1370.

[19] Thus, we can understand why the respondent was before the court in the first place for the relevant declaratory orders.

[20] However, insofar as the application at the court below which forms the basis of this appeal is concerned, we must put on record several preliminary concerns.

[21] First, the declaratory orders sought by the respondent concern the status and validity of the insurance contract made not between the parties before us but between the respondent and Selvamani, who is not a party in the appeal before us. It is undisputed that the issue concerning the validity of the renewed policy is a matter of utmost importance which has far-reaching consequences on the on-going civil action at the Sessions Court commenced by the appellant. The presence of the parties concerned is therefore necessary and important.

[22] Further, it is our view that given the nature of the issue, its determination by way of an exchange of affidavits and with the critical parties not before the court was not appropriate. The respondent's allegations of misrepresentation by Selvamani or by whoever had renewed the insurance policy without evidence of the circumstances as to how or when the insurance policy was actually renewed are necessarily questions of mixed fact and law; and the issue certainly involves Selvamani as well as the driver of the motor-van.

[23] No reasons were proffered as to their absence or lack of participation in the proceedings before the High Court. We cannot see how the appellant who is not a party to the insurance policy could ever be in the position to answer or even deal with the issue(s) posed by the respondent. The circumstances and conditions surrounding the renewal are clearly beyond the capacity and remit of the appellant to address let alone answer. Hence, such applications ought not to be dealt with in the manner done, especially where the relevant and necessary parties are not before the court. Similar views were expressed in *Zainudin Mat isa & Anor v. The Pacific Insurance Berhad & 2 Ors* [2017] 1 LNS 1979, and we adopt the same.

[24] Of greater concern is the non-dealing of the respondent's application pursuant to s. 129 and Schedule 9 of the Financial Services Act 2013 (Act 758). Since this is a new piece of legislation and case laws in this respect have not had the opportunity to address its application, we shall therefore devote the next part of our judgment on this.

[25] Act 758 is stated in its long title to be "an Act to provide for the regulation and supervision of financial institutions, payment systems and other relevant entities and the oversight of the money market and foreign exchange market to promote financial stability and for related, consequential or incidental matters." Act 758 received Royal Assent on 18 March 2013 and it came into operation on 30 June 2013 save for s. 129 and Schedule 9 – see P.U.(B) 276/2013. However, *vide* P.U.(B) 552/2014, s. 129 and Schedule 9 came into operation on 1 January 2015.

[26] Whether Act 758 applies in this appeal depends on the provisions of s. 129 and Schedule 9. Section 129 is housed in Division 3 of Act 758. Division 3 contains what we see are fairly comprehensive provisions on "insurance issues".

[27] Section 129 deals with the matter of "Pre-contractual disclosure and representations, and remedies for misrepresentations". It reads as follows:

> 129(1) Schedule 9 sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3.
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> (2) Any person who contravenes the duty of disclosure under paragraph 11 of Schedule 9 commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[28] The detailed provisions are thus to be found in Schedule 9; and we have taken the liberty of setting out the relevant parts of Parts 1, 2 and 3 of that Schedule so that our deliberations may be better appreciated and one can see how extensive and comprehensive these new provisions are, ranging from the inception of contracts of insurance, their renewals, the obligations of the respective parties and the kind of remedies that may be granted depending on the particular type of misrepresentation.

[29] The Schedule is divided into three Parts: Part 1 deals with "Preliminary" matters such as the application of the Schedule and other laws as well as providing for definitions of certain terms used in the Schedule; Part 2 contains detailed provisions on "pre-contractual disclosure and representations" while Part 3 deals with non-contestability and remedies for misrepresentation:

> **PART 1**
>
> **Preliminary**
>
> **Application of Schedule and other laws**
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> 1.(1) This Schedule shall not affect a contract of insurance entered into, varied or renewed before the date on which section 129 and this Schedule come into operation.

(2) Where there is a conflict or inconsistency between a provision of this Schedule and the Contracts Act 1950, the provision of this Schedule shall prevail.

(3) For the purposes of obtaining a declaration under subsection 96(3) of the Road Transport Act 1987, this Schedule shall apply to determine if a consumer insurance contract which provides cover for third party risks may be avoided by a licensed insurer for misrepresentation.

Interpretation

2. In this Schedule -

"consumer" means the individual who enters into, varies or renews a consumer insurance contract, or proposes to do so with a licensed insurer;

"consumer insurance contract" means a contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession.

Contracting out

3. (1) A term of a consumer insurance contract, or of any other contract, is rendered void to the extent that it would put the consumer in a worse position in respect of the matters mentioned in subparagraph (2) than he would be in by virtue of the provisions of this Schedule.

(2) The matters referred to in subparagraph (1) are –

(a) disclosure and representation by the consumer to the licensed insurer before the contract is entered into, varied or renewed; and

(b) the non-contestability of contracts of life insurance and any of the remedies for consumer insurance contracts provided in Part 3 of this Schedule.

(3) This paragraph does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

PART 2

Pre-contractual disclosure and representations

Pre-contractual duty of disclosure for insurance contracts other than consumer insurance contracts

4(1) Before a contract of insurance other than a consumer insurance contract is entered into, varied or renewed, a proposer shall disclose to the licensed insurer a matter that -

(a) he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied; or

(b) a reasonable person in the circumstances could be expected to know to be relevant.

A (2) The duty of disclosure shall not require the disclosure of a matter that:

(a) diminishes the risk to the licensed insurer;

(b) is of common knowledge;

(c) the licensed insurer knows or in the ordinary course of his business
B ought to know; or

(d) in respect of which the licensed insurer has waived any requirement for disclosure.

(3) Where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the
C licensed insurer and the matter was not pursued further by the insurer, compliance with the proposer's duty of disclosure in respect of the matter shall be deemed to have been waived by the insurer.

(4) A licensed insurer shall, before a contract of insurance is entered into, varied or renewed, clearly inform a proposer in writing of the proposer's
D pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

Pre-contractual duty of disclosure for consumer insurance contracts

5(1) Before a consumer insurance contract is entered into or varied, a
E licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions
F under subparagraph (1).

(3) Before a consumer insurance contract is renewed, a licensed insurer may either:

(a) request a consumer to answer one or more specific questions in accordance with subparagraph (1); or

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(b) give the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request the consumer to confirm or amend any change to the matter.

(4) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions
H under subsubparagraph (3)(a), or confirming or amending any matter under subsubparagraph (3)(b).

(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be
I deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subsubparagraph (3)(a), or fails to confirm or amend any matter under subsubparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

(8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

(9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

Duty to take reasonable care

6. ...

Misrepresentation in respect of insurance contracts

7(1) Part 3 of this Schedule -

(a) in Division 1, makes provision for a misrepresentation made in relation to a contract of life insurance, whether or not a consumer insurance contract, which has been effected for a period of more than two years; and

(b) in Division 2, sets out the remedies available to a licensed insurer for a misrepresentation made in respect of –

(i) a consumer insurance contract of life insurance which has been effected for a period of two years or less; and

(ii) a consumer insurance contract of general insurance.

(2) The remedies set out in Division 2 shall be available to a licensed insurer for misrepresentation made by a consumer before a consumer insurance contract referred to in subsubpragraph (1)(b) was entered into, varied or renewed if -

(a) the consumer has made a misrepresentation in breach of his duty under subparagraph 5(2) or (4); and

A (b) the licensed insurer shows that had it known the true facts, it would not have entered into the contract, or agreed to the variation or renewal, or would only have done so on different terms.

(3) For the purposes of this Schedule, a misrepresentation for which a licensed insurer has a remedy in Division 2 against a consumer may be B classified as -

(a) deliberate or reckless;

(b) careless; or

(c) innocent.

C (4) A misrepresentation is deliberate or reckless if the consumer knew that

(a) it was untrue or misleading, or did not care whether or not it was untrue or misleading; and

(b) the matter to which the misrepresentation related was relevant to the licensed insurer, or did not care whether or not it was relevant D to the insurer.

(5) A misrepresentation made dishonestly is to be regarded as having being made deliberately or recklessly.

(6) A misrepresentation is careless or innocent, as the case may be, if it is not deliberate or reckless. E

(7) It is for the licensed insurer to show that a misrepresentation was deliberate or reckless on a balance of probability.

(8) Unless the contrary is shown, it is to be presumed that the consumer knew that a matter about which the licensed insurer asked a clear and specific question was relevant to the insurer. F

Group policies

8. ...

Insurance on life of another

G 9. ...

Warranties and representations

10. ...

Insurer's, etc. pre-contractual duty of disclosure

H 11. ...

Knowledge of, and settlement by insurance agent

12. ...

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PART 3

Non-contestability and remedies for misrepresentations

Division 1

Non-contestability

Non-contestability for life insurance contracts

13. (1)...

Division 2

Remedies for misrepresentation

Application of Division

14. This Division sets out the remedies available to a licensed insurer for a misrepresentation by a consumer made in respect of:

(a) a consumer insurance contract of life insurance which has been effected for a period of two years or less; and

(b) a consumer insurance contract of general insurance.

Remedies for deliberate or reckless misrepresentation

15. If a misrepresentation was deliberate or reckless, a licensed insurer may avoid the consumer insurance contract and refuse all claims.

Remedies for careless or innocent misrepresentation

16(1) If a misrepresentation was careless or innocent, the licensed insurer's remedies shall be based on what it would have done if the consumer complied with the duty set out in paragraph 5 and subparagraphs (2) to (4) are to be read accordingly.

(2) If the licensed insurer would not have entered into or renewed the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but shall return any premium paid by him.

(3) If the licensed insurer would have entered into or renewed the consumer insurance contract, but on different terms excluding terms relating to the premium, the contract is to be treated as if it had been entered into or renewed on those different terms if the insurer so requires.

(4) In addition, if the licensed insurer would have entered into or renewed the consumer insurance contract, whether the terms relating to matters other than the premium would have been the same or different, but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim as may be specified by the Bank.

A **Future treatment of contract**

17. ...

Variations

18. ...

B **Division 3**

Modifications for group policies

19. ...

[30] As can be seen from the above terms of Schedule 9, there is quite an C elaborate regime on how this duty of disclosure is to be dealt with, the matter of misrepresentation and more importantly, how applications for declarations under s. 96(3) of Act 333 are to be dealt with – see sub-para. 1(3).

[31] On the question of whether Schedule 9 applies to the insurance D contract under consideration, para. 1 of Schedule 9 states that the Schedule does not affect a "contract of insurance" entered into, varied or renewed before s. 129 and Schedule 9 came into operation, that is, contracts which were entered into, varied or renewed before 1 January 2015. The term "contract of insurance" is not defined but the term "consumer insurance E contract" is.

[32] We note that Schedule 9 makes a distinction between contracts of insurance with consumer insurance contracts, the latter being defined in para. 2 as "a contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business F or profession." It would appear that the policy in this appeal, that is, Policy No. 213-081-16-004654 which was renewed from 10 May 2016 to 9 May 2017 is a consumer insurance contract. Consequently, and by necessary implication, Act 758 applies to the present appeal in that s. 129 and thereby Schedule 9 will apply to all consumer insurance contracts which were either G entered into or renewed after 1 January 2015.

[33] Further, and in any event, sub-para. 1(3) specifically provides that Schedule 9 "shall apply" to determine where the insurer, such as the respondent, is in court for a declaration under s. 96(3) of Act 333 so as to avoid providing cover for risks to third parties such as the appellant on the H ground of misrepresentation. In other words, in the determination of the respondent's application for a declaration under sub-s. 96(3) that the respondent is entitled to avoid liability to the appellant for third party risks under the renewed policy due to Selvamani or whoever's misrepresentation, the court is obliged to apply the specific regime in Schedule 9.

I

[34] Two further provisions require mention. By virtue of para. 1(2) of Schedule 9, s. 129 and Schedule 9 will prevail and override the provisions of the Contracts Act 1950 in the event there is any conflict or inconsistency between these two laws. Pursuant to sub-paras. 3(1) and (2), there cannot be any contracting out of the application of Schedule 9 on matters relating to disclosure and representations and on the non-contestability and remedies.

[35] These comprehensive provisions deal with how an application for a new contract or a renewal of a contract of insurance is to be dealt with; what happens when there has been non-compliance by either party to this statutory regime and, of great importance, the operation of the doctrine of waiver by law; distinguishing as we said earlier between contracts of insurance and consumer insurance contracts. In relation to the policy in question, it being a consumer insurance contract, para. 5 applies. The new statutory regime recognises in sub-para. 5(9), the mutual duty of utmost good faith or *uberrimae fidei* that is owed at all times by both parties to the insurance contract, whether on the part of the insurer or the insured; whether it is in relation to a new insurance contract or a renewal of the same.

[36] On the part of the insurer, the new statutory regime gives the insurer the right to request answers by posing questions, either specific or general. In the case of a new contract or one which is being varied, the insurer may request or pose to the customer questions to elicit answers or information which will assist the insurer on whether it will accept the risks, and what rates and terms it is to impose – see sub-para. 5(1). Where the insurer undertakes this exercise, the consumer owes a corresponding duty to take reasonable care not to make any misrepresentations to the insurer when answering any of the questions posed – see sub-para. 5(2). The consumer must always answer truthfully and completely – sub-para. 5(9).

[37] This duty of utmost good faith does not end with the imposition of duty on the consumer. In relation to the insurer, the doctrine of waiver operates. Where the insurer does not undertake the exercise of posing questions when considering whether or not to assume risks and enter the contract of insurance with the consumer, the insurer is deemed to have waived the right to complain that there has been a failure of disclosure – sub-para. 5(5).

[38] The insurer is also deemed to have waived its right to complain in the second situation where questions are posed but the consumer has come up short in their responses or have simply failed to respond to those questions. Now, if either of those situations arise, that is where the consumer fails to answer, or where the consumer gives an incomplete or irrelevant answer, it is implied in sub-para. 3(6) that the insurer is to follow up with the consumer on such failure. Where the insurer itself fails to do so, where it does not pursue the matter, the consumer's duty of disclosure "shall be deemed to have been waived by the insurer" under sub-para. 5(6).

[39] The above deals with new contracts of insurance or contracts which are being varied. There are also specific provisions dealing with renewals of the insurance policy. In such a case, sub-subparas. 5(3)(a) and (b) apply.

[40] In such a situation, the insurer may pose one or specific questions, once again, for the purpose of ascertaining whether to assume the risks, and what rates or terms are to be imposed. Alternatively, the insurer may give to the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request the consumer to either confirm or amend any change to the matter.

[41] When asked by the insurer, the consumer is required to respond. And, once again, if the consumer fails to respond, be it to confirm or to amend any matter queried by the insurer, the insurer is expected to pursue the matter. If it fails to do so, just like the case of new contracts of insurance, the insurer will be deemed to have waived its rights to require disclosure by the consumer – see sub-para. 5(6).

[42] Thus, whether it is a case of a new consumer insurance contract or a renewal of such contract, the consumer is always under a duty to take reasonable care not to make any misrepresentations to the insurer – see sub-paras. 5(2) and (9). The consumer must ensure that there is no misrepresentation, whether deliberate or reckless, careless or even innocent.

[43] It is apparent from these provisions, that where the insurer is in itself in breach either by not pursuing or safeguarding its own interests and obligations, it will not be open to the insurer to approach the court for a declaration under s. 96(3) of Act 333 to void the insurance contract. This becomes clearer when Parts 2 and 3 are examined closely.

[44] Subparagraphs 7(3) to (8) found in Part 2 of the Schedule, spell out when misrepresentation may be properly regarded as misrepresentation for the purpose of securing a declaration under s. 96(3) of Act 333. It is only where the conditions laid down in these provisions are met that there is misrepresentation for which the insurer may avail itself to the particular remedies spelt out in Part 3. Those remedies involve the insurer returning any premiums paid, especially where the insurer is asserting that it would not have entered into or renewed the insurance policy in the case of innocent or careless misrepresentation is alleged.

[45] As can be seen from sub-para. 7(4), much will depend on knowledge on the part of Selvamani or whoever renewed the insurance policy at the material time. Whether misrepresentation exists is therefore very much fact sensitive, confirming our earlier opinion on the unsuitability of how the whole application was conducted by the High Court. The burden is on the respondent to prove the existence of misrepresentation; that it would not

have entered into or renewed the insurance policy had it been aware of the true facts; and we have no information as to when the policy was actually submitted for renewal and the circumstances of the renewal.

[46] We can appreciate this new statutory regime under s. 129 and Schedule 9; that consistent with the intent of the statutory regime emplaced under ss. 90 and 96 of Act 333 to ensure the meaningful presence of assumption of minimum third party risks, there must be a balanced and mutual duty of utmost good faith owed by all parties to the contract, whether it is a contract of insurance or a consumer insurance contract.

[47] In the case of third party risks, it is almost impossible for innocent third parties who are involved in road traffic accidents to be in possession of any knowledge of the contract of insurance or the consumer insurance contract, let alone the conditions or circumstances under which such contracts were made. The enactment of the statutory regime that we now see in Schedule 9 evens out or balances that duty of utmost good faith and makes the safeguards under Act 333 more meaningful and its social intent or objectives of minimum compulsory insurance, respected and achieved.

[48] Applying the above provisions to the renewed policy in question, it is without doubt that it was a policy which was renewed in which case, sub-para. 5(3) applies. And, as was pointed out earlier, we find that the respondent has not discharged its burden of proof under s. 129 read together with Schedule 9 of Act 758 so as to be entitled to these discretionary remedies. It never posed any questions to Selvamani or whoever was renewing the policy. We do not see how just the fact that Selvamani was deceased *ipso facto* invalidates the renewed policy. In our view, this is incorrect. The whole process or procedure under Schedule 9 must be complied with and answered, something which we have already pointed out was not undertaken by the High Court.

[49] Under sub-subparas. 5(3)(a) and (b), the respondent may do either of two things when there is an application to renew the insurance policy. The respondent may request Selvamani or whoever was renewing the insurance policy to answer one or more specific questions in accordance with sub-para. (1). The questions asked being specific questions that are relevant to the respondent's decision whether or not to accept the risk, and the rates and terms to be imposed. Alternatively, the respondent may give Selvamani or whoever was renewing the insurance policy, a copy of any matter previously disclosed by Selvamani in relation to the contract and request Selvamani or whoever was renewing the insurance policy, to confirm or amend any change to the matter.

[50] Where the respondent makes either of these requests, Selvamani or whoever was renewing the insurance policy, has a duty under sub-para. 5(4) "to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under sub-subpara. (3)(a), or confirming or amending any matter under sub-subpara. (3)(b)".

[51] If there is any breach of this duty of disclosure, whether by reason of incomplete disclosure, failure to disclose or by giving any irrelevant answers, sub-para. 5(6) obliges the respondent to follow up on that failure or on that incomplete answer. If the respondent does not do so, then the respondent shall be deemed to have waived the right to complain about Selvamani's failure to comply with his duty of disclosure; this is the second instance where the principle of waiver operates.

[52] From the grounds of decision, it is apparent that this whole exercise was never undertaken or considered by the learned judge. It is our firm view that para. 1(3) must be complied with as its terms are couched in mandatory language. The failure of the learned judge to apply s. 129 and Schedule 9 is sufficient reason for this court to intervene and set aside the decision of the learned judge granting the declaration sought under s. 96(3) of Act 333.

[53] Having examined the records of appeal and the submissions made, we find that the respondent has also failed to satisfy the burden imposed and its application ought to have been dismissed. There is no evidence at all of the respondent doing any of the matters that are mentioned in Schedule 9, especially sub-para. 5(3) nor of the judge addressing these critical matters. Under such conditions, it was not open to the respondent to approach the court and complain that there was misrepresentation. All that we can find in the records of appeal is the allegation that there was misrepresentation by Selvamani and this arises by deduction and surmisation on the part of the respondent.

[54] According to the affidavit filed in support of the application, the respondent contended that it discovered through its adjusters that Selvamani had already passed away on 20 April 2016. It learnt of this only after the appellant had filed the civil claim for the accident on 28 October 2016 when Selvamani and the driver, the first defendant, failed to attend their lawyers' office for case preparation. The respondent claimed that it also discovered that the insurance policy was renewed on 10 May 2016, after Selvamani had passed away and this renewal in Selvamani's name must have been by someone other than Selvamani. It is under these circumstances and for these reasons that the respondent alleged that since the insurance policy was renewed by misrepresentation by someone other than Selvamani without disclosing the material fact that Selvamani had already passed away, the

insurance policy is null and void for fundamental breach of the principle of *uberrimae fidei* or utmost good faith and it is entitled to void that insurance contract.

[55] There is, however, no information at all as to when or how exactly the application for renewal of the insurance policy was made, and what questions were raised by the respondent. On the contrary, it may be reasonably concluded that the respondent did none of the matters or undertook any of the steps mentioned, that it did not ask any questions or sought any confirmation or amendment at the material time of renewal of the insurance policy.

[56] Against such a factual backdrop, we find that the learned judge was not entitled to make the findings and arrive at the conclusion that he did. We find that there was absolutely no basis for the learned judge to conclude "that the policy was renewed by misrepresentation and trickery" or that it was "an illegal policy".

[57] We are deeply troubled by such findings in the face of glaring evidence to the contrary in that there was absolutely no evidence led by the respondent to show the various procedural steps that it was required to undertake under Schedule 9. That in compliance with its duty of utmost good faith, it had posed to Selvamani or whoever was renewing the insurance policy certain questions or had requested Selvamani to confirm or amend certain matters learnt from its earlier contract of insurance; that there were either no answers or incomplete answers despite its follow-up with Selvamani. It is only under such conditions that the court can properly and justifiably grant the declaratory orders sought by the respondent.

[58] What the learned judge did was to find that since Selvamani had already passed away before the insurance policy was renewed, the renewal must have been processed by means of "misrepresentation and trickery". According to the learned judge, "the very fact that the insured in this case had already passed away before the renewal offer was made on 10 May 2016, clearly reflect that the said renewal was made by a third party without disclosing the fact that the insured has already passed away" that such a contract itself "is a breach of s. 150(1) Insurance Act 1996 (Act 553) [repealed by the Financial Services Act 2013 (Act 758))"; that the respondent was thus "well within time to seek the declaratory reliefs as prayed herein as an aggrieved party ... because there is clearly a breach of contract under the utmost good faith representation principle on the fact of the contract in view of the insured's death (20 April 2016) prior to the issuance of the policy (10 May 2016)". The learned judge further added that "one cannot having breached the principles of *uberrimae fidei* ... and by trickery expect the plaintiff (insurer) to be liable under an illegal policy."

[59] With respect to the learned judge, that whole reasoning is without basis. Having been aware that s. 150(1) of the Insurance Act was already repealed by the Financial Services Act 2013, it was no longer open to him to consider the matter under that provision, and worse, to find that there was a breach of that repealed provision and describe it as an "illegality". Instead, the court must now proceed to consider the application under the terms of Act 758.

[60] In our view, that was a serious error of law on the part of the learned judge. Devoid of any compliance of the mandatory requirements emplaced under s. 129 and Schedule 9 of Act 758, we are firmly of the view that the respondent was not at all entitled to the orders granted by the High Court. It would be in direct contravention of s. 129 and Schedule 9 of Act 758 were this court to condone such breaches. To not do so will bring untold injustice and prejudice to innocent third parties such as the appellant in this appeal, the parties we believe were the intended recipients of the benefits behind ss. 90 and 96 of Act 333 and s. 129 of Act 758.

[61] The authorities such as the Federal Court decision in *Pacific & Orient Insurance Co Berhad v. Hameed Jagubar Syed Ahmad* (*supra*) and the Court of Appeal decision in *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd* [2015] 9 CLJ 552, cited by the respondent were decided under the old law and were concerned with contracts of insurance made prior to the coming of operation of s. 129 and Schedule 9 of Act 758 on 1 January 2015, and are thus, not applicable.

[62] We would not be wrong to suggest that the law must have been amended to address the hardship that third parties, like the appellant before us, face in cases where the validity of the insurance policies are challenged and the court is asked to grant declarations under s. 96(3) of Act 333. The third parties are simply not in the position to address any of the issues that may arise like the appellant and have in fact arisen as we see in this appeal. This then whittles down to naught the very benefit and purpose that was intended under s. 90 of Act 333 and s. 129 of Act 758.

[63] Under such circumstances, there was no basis for the exercise of discretion in granting the declarations sought by the respondent. In fact, it would be unjust for the court to grant such orders – see *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Co (M) Bhd.* [2015] 9 CLJ 821; [2015] 6 MLJ 223.

[64] Consequently, we must allow this appeal and set aside the decision of the High Court and we dismiss the amended originating summons in encl. 15 with costs of RM10,000 here and below subject to the payment of allocatur fees.